

On October 16, 2019 the Court ordered the parties to provide reports on three topics through supplemental briefing. Dkt. No. 253. The Court also invited the parties to submit any additional information that they deem relevant to those topics. The United States, on behalf of the United States Environmental Protection Agency (“U.S. EPA”), hereby submits the following status report and attached documents in response to the Court’s order.

- 1) **The current status of the City of Akron's delay regarding completion of the Ohio Canal Tunnel, including a current expected completion date.**

The United States expects that the City of Akron, which has far more complete and current information, will respond on this topic. We have not received a written update from the City about the status of the Ohio Canal Interceptor Tunnel (“OCIT”) project since July 26, 2019. In a letter dated August 21, 2019, the United States requested regular updates from the City regarding the OCIT, including its projected completion date and any efforts made to expedite construction or minimize adverse effects from the delay. *Attachment A*. The City responded by letter dated September 6, 2019. *Attachment B*. Although the parties have had several phone conferences regarding these issues since the City’s letter, Akron has not yet provided the information requested in our August 21 letter. The United States reiterated its need for the City to respond substantively to its August 21 letter and requested additional related information by letter dated October 28, 2019. *Attachment C*. It is the United States’ current understanding that the City will begin to provide the requested information by mid-November. As previously represented to the Court, and explained in the attached letters, the United States has reserved all of its rights and is evaluating its options for enforcement under the Consent Decree.

2) The finalized operation and maintenance plans for every Green Infrastructure project that is proposed in the Second Amendment and were not finalized at the time of the Court’s evidentiary hearing.

On October 16, 2019, the City of Akron submitted a revised Operation and Maintenance Plan for Racks 26 and 28. *Attachment D*. The United States and State approved the plan on October 23, 2019. *Attachment E*. The Operation and Maintenance plan for Rack 3 is not due until August 30, 2020. Proposed Second Amendment to Consent Decree: Row 1a, LTCP Update, Dkt. 190-2.

3) The finalized agreements, if any, regarding the supplemental environmental projects that will be undertaken based upon Akron’s failure to complete the Ohio Canal Tunnel by the date required in the Long Term Control Plan and its resulting environmental harm.

To date, the parties have not agreed on any projects that would address environmental harms associated with the City’s delay in completing the OCIT.

Even if the parties identify and the United States agrees to a project or projects that would address environmental harm stemming from the delay, they are unlikely to fall within the definition of “Supplemental Environmental Projects” or “SEPs,” given current Department of Justice policies regarding SEPs. In November 2018, Attorney General Sessions announced a new policy governing civil consent decrees and settlements with state and local governments. *See* Memorandum from the Attorney General, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (Nov. 7, 2018), available at <https://www.justice.gov/opa/press-release/file/1109621/download>. Assistant Attorney General Clark has recently clarified that this policy precludes the use of SEPs in enforcement actions involving state and local government defendants (including cases regarding municipal sewers), absent an exception. *See* Memorandum from the Assistant Attorney General, Using Supplemental Environmental Projects (“SEPs”) in Settlements with State and Local Governments (Aug. 21, 2019), available at <https://www.justice.gov/enrd/page/file/1197056/download>. Further, U.S. EPA policy prohibits the United States from accepting a SEP to offset the stipulated penalties that have accrued as a result of the City’s delay in completing the OCIT. *See* Memorandum from Assistant Administrator Cynthia Giles, Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy, (March 10, 2015) pp. 35-36, available at <https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>.

Respectfully submitted,

Date: October 30, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2019, a copy of the United States' **Status Report and Attachments thereto** were filed electronically. Notice of this filing will be sent to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

Date: October 30, 2019

Respectfully submitted,

/s/ Bonnie A. Cosgrove
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